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Fletcher*

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## The "Same Criminal Conduct" Exception of the Washington Sentencing Reform Act: Making the Punishment Fit the Crimes—State v. Collicott, 112 Wash. 2d 399, 771 P.2d 1137 (1989)

Joseph P. Bennett

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**THE "SAME CRIMINAL CONDUCT" EXCEPTION OF THE WASHINGTON SENTENCING REFORM ACT: MAKING THE PUNISHMENT FIT THE CRIMES—*State v. Collicott*, 112 Wash. 2d 399, 771 P.2d 1137 (1989).**

*Abstract:* Under the Washington Sentencing Reform Act (SRA), two or more offenses committed in one transaction count as criminal history for the purpose of enhancing the sentence for each offense, unless the offenses encompass the "same criminal conduct." In *State v. Collicott*, the Washington Supreme Court held that offenses that share statutory elements constitute the same criminal conduct. The court's previous approach in *State v. Dunaway* focused on whether one crime furthered another. Analysis demonstrates that *Dunaway* better provides for proportionate sentences, and coupled with the merger doctrine, adequately prevents double punishment. Thus, the Washington Legislature should amend the SRA to codify the *Dunaway* approach.

In September of 1985, Eric Collicott illegally entered a counseling center and began stealing electronic equipment. While inside the center, he encountered a woman who had been sleeping in the building. Armed with a knife, he took the woman to another room, and bound and gagged her. After loading the stolen property into a car, he returned and raped her. Collicott then forced the woman to accompany him as he drove to another location where he could get a gun. Eventually the victim escaped and contacted the police.<sup>1</sup> Collicott pleaded guilty to first degree burglary, first degree rape, and first degree kidnapping.<sup>2</sup>

In *State v. Collicott*,<sup>3</sup> a bitterly divided Washington Supreme Court held that these three crimes encompassed the same criminal conduct for sentencing purposes.<sup>4</sup> The case required the court to interpret the "same criminal conduct" exception of the Washington Sentencing Reform Act of 1981 (SRA).<sup>5</sup> If several offenses committed during a single criminal episode encompass the same criminal conduct, the

1. *State v. Collicott*, 112 Wash. 2d 399, 401-02, 771 P.2d 1137, 1137-38 (1989).

2. *Id.* at 400, 771 P.2d at 1137. The elements of first degree burglary are unlawful entry or presence in a dwelling with an intent to commit a crime therein and possession of a deadly weapon or an assault on any person in the dwelling. WASH. REV. CODE § 9A.52.020 (1989). The elements of first degree rape are sexual intercourse by forcible compulsion and use of a deadly weapon, or kidnapping, or infliction of serious physical injury, or felonious entry of a building or vehicle in which the victim is situated. *Id.* § 9A.44.040. The elements of first degree kidnapping are intentional abduction with intent to use the victim for ransom, shield, or hostage; or to facilitate a felony or flight therefrom; or to inflict physical injury; or to inflict extreme emotional distress; or to interfere with the performance of any governmental function. *Id.* § 9A.40.020.

3. 112 Wash. 2d 399, 771 P.2d 1137 (1989).

4. *Id.* at 412, 771 P.2d at 1143. Justice Utter wrote for a plurality of four, with Justice Dolliver concurring only in the result and four justices dissenting. *Id.*

5. *Id.* at 400, 771 P.2d at 1137.

SRA mandates a significantly reduced sentence range.<sup>6</sup> Thus, Collicott's sentence was no greater than had he only committed rape.<sup>7</sup> The court justified its decision as necessary to avoid punishing the defendant twice.<sup>8</sup>

The problem of determining the appropriate sentence for multiple offenses committed during a single episode long predates the SRA. Existing constitutional and common law doctrines seek to limit the number of offenses that can be charged from a single criminal scenario. The Double Jeopardy Clause of the Fifth Amendment bars multiple charges or punishments for the same offense.<sup>9</sup> The common law doctrine of merger provides comparable protection based on legislative intent.<sup>10</sup>

The SRA's same criminal conduct exception represents a similar desire, on the part of the Washington Legislature, to avoid unfair cumulative punishment. Nevertheless, the *Collicott* interpretation of same criminal conduct fails to protect against double punishment in some cases, and in other cases expands the exception so that it undermines proportionate sentencing. Analysis shows that the Washington Supreme Court's earlier approach to same criminal conduct, as articulated in *State v. Dunaway*,<sup>11</sup> is superior to *Collicott*. The *Dunaway* approach leads to more proportionate sentences, and together with the merger doctrine, adequately protects against double punishment. Therefore, the Legislature should amend the SRA to define same criminal conduct consistent with *Dunaway*.

## I. TRADITIONAL AND NEW APPROACHES TO THE PROBLEM OF DOUBLE PUNISHMENT

### A. *The Traditional Protections: Double Jeopardy and Merger*

The *Collicott* majority justified its decision on the basis that it protected the defendant from being punished twice.<sup>12</sup> This appeal to fairness is pivotal to the court's decision. Concern about double punishment is not new. Courts have long employed two doctrines to

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6. See *infra* note 71 (illustrating how an offender score enhances Collicott's sentences).

7. See *infra* notes 36-47 and accompanying text (discussing the method of calculating sentences).

8. *Collicott*, 112 Wash. 2d at 406, 771 P.2d at 1140.

9. U.S. CONST. amend. V; see also WASH. CONST. art. I, § 9; see *infra* notes 13-20 and accompanying text (discussing double jeopardy).

10. See *infra* notes 21-26 and accompanying text (discussing merger).

11. 109 Wash. 2d 207, 743 P.2d 1237 (1987).

12. *Collicott*, 112 Wash. 2d at 406, 771 P.2d at 1140.

limit cumulative punishment: the Double Jeopardy Clause and the merger doctrine.

The Double Jeopardy Clause of the Fifth Amendment<sup>13</sup> provides only limited protection against multiple punishment. The plain language of the clause prohibits successive prosecutions for the same offense.<sup>14</sup> Furthermore, courts cannot impose cumulative punishments for the same offense.<sup>15</sup> The Double Jeopardy Clause also prevents multiple penalties for multiple acts, or single acts that violate two or more statutes, if the same evidence is required to prove each offense.<sup>16</sup> In order to constitute the "same offense" offenses must be the "same" in both law and fact.<sup>17</sup> Thus, all of the elements of one offense must be included in another offense and proof of one must necessarily prove the other.<sup>18</sup> Otherwise, the offenses are not the same and conviction for each offense is permissible.<sup>19</sup> Finally, the Double Jeopardy Clause does not prohibit cumulative punishment where the legislature specifically authorizes punishment under two statutes.<sup>20</sup>

The common law doctrine of merger provides greater protection than is available under double jeopardy. Although criminal defendants often invoke merger and double jeopardy in the same case,<sup>21</sup> proof of one offense may not necessarily prove another merged offense.<sup>22</sup> The purpose of merger is to prevent prosecutors from "pyramiding" charges arising out of a single criminal transaction where the legislature did not intend the offenses to be prosecuted separately.<sup>23</sup> Thus, when one statutory offense is used to elevate the degree

13. U.S. CONST. amend. V.

14. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." *Id.*

15. *See Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1872).

16. *See Blockburger v. United States*, 284 U.S. 299, 302 (1932).

17. *State v. Vladovic*, 99 Wash. 2d 413, 423, 662 P.2d 853, 858 (1983); *see also Brown v. Ohio*, 432 U.S. 161, 167-68 (1977) (Double Jeopardy Clause prohibits punishment for both joyriding and auto theft where all of the elements of joyriding are included in auto theft and the same facts are used to prove both offenses).

18. *Vladovic*, 99 Wash. 2d at 423, 662 P.2d at 858.

19. *Id.*

20. *See Missouri v. Hunter*, 459 U.S. 359 (1982) (holding that the Double Jeopardy Clause is not violated where the legislature intended punishment for both armed criminal action and first degree robbery).

21. *See, e.g., Vladovic*, 99 Wash. 2d 413, 662 P.2d 853 (1983); *State v. Johnson*, 96 Wash. 2d 926, 639 P.2d 1332 (1982) (*Johnson II*); and *State v. Johnson*, 92 Wash. 2d 671, 600 P.2d 1249 (1979) (*Johnson I*).

22. For example, convictions for rape and burglary merge if proof of first degree rape requires proof of both rape and a burglary. However, neither the rape nor the burglary alone necessarily proves the other offense. *Vladovic*, 99 Wash. 2d at 420-21, 662 P.2d at 857.

23. *Johnson II*, 96 Wash. 2d at 936, 639 P.2d at 1337.

of another offense the lesser offense merges into the greater offense,<sup>24</sup> unless the injuries caused by the two crimes are separate and distinct.<sup>25</sup> The Washington Supreme Court has announced a merger rule that bars separate conviction and punishment for crimes that are used to enhance another crime.<sup>26</sup>

*B. The Sentencing Reform Act and the "Same Criminal Conduct" Exception*

*1. The Sentencing Reform Act*

The Washington Sentencing Reform Act of 1981 (SRA)<sup>27</sup> attempts to provide for sentences that balance judicial discretion and legislative rule.<sup>28</sup> Before the SRA, trial judges had significant discretion in sentencing a defendant convicted of two or more offenses arising out of the same transaction. The judge could order the sentences to run consecutively or concurrently.<sup>29</sup> Thus, different defendants could receive widely disparate sentences for the same crimes. This prompted the Legislature to direct the Sentencing Guidelines Commission to recommend under what circumstances concurrent or consecutive sentences are appropriate.<sup>30</sup> The Legislature, with minor changes, adopted the Commission's recommended sentencing standards,<sup>31</sup> and codified these recommendations in the SRA.<sup>32</sup>

The primary goal of the SRA is retribution.<sup>33</sup> The first three stated purposes of the SRA are to provide punishment that is proportionate to the criminal offense, just, and commensurate with punishments imposed for similar crimes.<sup>34</sup> Sentences should also protect the public, make frugal use of state resources, and give the offender an opportunity to improve him or herself.<sup>35</sup>

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24. *Vladovic*, 99 Wash. 2d at 419, 662 P.2d at 856.

25. *Id.* at 421, 662 P.2d at 857.

26. *State v. Johnson*, 92 Wash. 2d 671, 681, 600 P.2d 1249, 1254 (1979) (*Johnson I*) (kidnapping and assault merged into first degree rape because the merged crimes were necessary elements of first degree rape, but do not violate the Double Jeopardy Clause).

27. WASH. REV. CODE § 9.94A.010-.910 (1989).

28. D. BOERNER, SENTENCING IN WASHINGTON § 2.1, at 2-2 (1985).

29. WASH. REV. CODE § 9.92.080.

30. *Id.* § 9.94A.040(2)(c); see also D. BOERNER, *supra* note 28, § 5.8(a), at 5-14.

31. WASHINGTON STATE LEGISLATURE, FINAL LEGISLATIVE REPORT OF 1983, at 99-100 (1983).

32. WASH. REV. CODE § 9.94A.010-.910 (1989).

33. D. BOERNER, *supra* note 28, § 2.5(a), at 2-31.

34. WASH. REV. CODE § 9.94A.010(1)-(3).

35. *Id.* § 9.94A.010(4)-(6).

The SRA structures but does not entirely eliminate judicial discretion<sup>36</sup> by providing a presumptive sentence range for each criminal offense.<sup>37</sup> Two factors determine the sentence range: the crime's seriousness level<sup>38</sup> and the length and seriousness of the defendant's criminal history (referred to as the "offender score").<sup>39</sup> The SRA uses a sentencing grid with the seriousness level as the vertical axis and the offender score as the horizontal axis.<sup>40</sup> The intersection of the two axes locates the presumptive sentence range.<sup>41</sup> In addition, possession of a "deadly weapon" separately enhances the presumptive sentence range of certain crimes.<sup>42</sup>

The SRA treats multiple crimes as more serious and deserving of punishment than single crimes.<sup>43</sup> When a defendant is convicted of two or more offenses, the other current convictions count as criminal history for each crime.<sup>44</sup> The offender receives a sentence range for each offense, which is enhanced by an offender score based on the other offenses.<sup>45</sup> All sentences so determined run concurrently,<sup>46</sup> unless a person is convicted of three or more "serious violent" offenses.<sup>47</sup>

## 2. *The "Same Criminal Conduct Exception" and Pre-Collicott Interpretations*

The SRA further refines the constitutional and common law rules governing multiple offenses arising out of a single criminal transaction. If a defendant's multiple current convictions constitute the same criminal conduct, then those current convictions are counted as one crime

36. *Id.* § 9.94A.010.

37. *Id.* § 9.94A.310.

38. *Id.* § 9.94A.320. Seriousness levels range from level I (e.g., second degree theft) to level XIV (e.g., aggravated first degree murder). *Id.*

39. WASH. REV. CODE § 9.94A.330 (1989). The offender scores for Collicott's crimes are as follows: the offender score for rape and kidnapping is five for each (three for the rape or kidnapping and two for the burglary); the offender score for burglary is four (two for the rape and two for the kidnapping). *Id.*; see also STATE OF WASHINGTON SENTENCING GUIDELINES COMM'N, SENTENCING GUIDELINES IMPLEMENTATION MANUAL, III-18, III-56, III-73 (1988) [hereinafter 1988 MANUAL].

40. WASH. REV. CODE § 9.94A.310 (1989).

41. *Id.*

42. *Id.* § 9.94A.125. In *Collicott*, the defendant's knife qualified as a deadly weapon, thus enhancing the standard range for the burglary by 18 months and the range for the rape and kidnapping by 24 months each. *Id.* § 9.94A.310.

43. D. BOERNER, *supra* note 28, § 5.8(a), at 5-16.

44. WASH. REV. CODE § 9.94A.400(1)(a) (1989).

45. *Id.* § 9.94A.310-320.

46. *Id.*

47. *Id.* § 9.94A.400(1)(b) (in which case sentences run consecutively).

in determining criminal history.<sup>48</sup> In effect, this means that current convictions do not count as criminal history.<sup>49</sup> Originally, the SRA did not define "same criminal conduct."<sup>50</sup> Instead, the Sentencing Guidelines Commission provided one example of offenses that fall within the exception—second degree burglary and possession of stolen goods obtained in the same burglary.<sup>51</sup>

Prior to *Collicott*, there were a variety of interpretations of same criminal conduct. The Washington Court of Appeals first confronted the issue in *State v. Edwards*.<sup>52</sup> Subsequent appellate courts followed *Edwards* until the Washington Supreme Court modified it in *State v. Dunaway*.<sup>53</sup> In 1987, the Legislature amended the SRA to define same criminal conduct.<sup>54</sup>

From the beginning, courts focused on intent as the key to determining whether offenses encompass the same criminal conduct. In *Edwards*, the court held that second degree kidnapping and second degree assault encompassed the same criminal conduct where the defendant abducted one victim in her automobile and waved a gun at another victim during the kidnapping incident.<sup>55</sup> The court reasoned that offenses constitute the same criminal conduct if the defendant's objective criminal intent did not change from one crime to the next.<sup>56</sup> Objective criminal intent depended upon two subsidiary questions: whether one crime furthered another and whether the crimes were committed at the same time and place.<sup>57</sup>

In 1987, the Legislature defined same criminal conduct differently than *Edwards*.<sup>58</sup> According to the amendment, same criminal conduct means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."<sup>59</sup> Unlike *Edwards*, objective criminal intent is not the primary focus of the amendment. Rather, intent is one of three factors used to deter-

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48. *Id.* § 9.94A.400(1)(a).

49. Because the sentences run concurrently, the defendant is punished only for the offense that yields the highest offender score. 1988 MANUAL, *supra* note 39, at I-7.

50. WASH. REV. CODE § 9.94A.400(1)(a) (1986) (amended 1987).

51. Motion 84-368, *Minutes*, State of Washington Sentencing Guidelines Comm'n, January 6, 1984; *see also* D. BOERNER, *supra* note 28, § 5.8(a), at 5-17 (interpreting the example as support for a narrow construction of the exception).

52. 45 Wash. App. 378, 725 P.2d 442 (1986).

53. 109 Wash. 2d 207, 214, 743 P.2d 1237, 1240 (1987).

54. 1987 Wash. Laws, ch. 456, § 5 (effective July 26, 1987).

55. *Edwards*, 45 Wash. App. 378, 725 P.2d 442 (1986).

56. *Id.* at 382, 725 P.2d at 445.

57. *Id.*

58. 1987 Wash. Laws, ch. 456, § 5.

59. *Id.* This definition is codified in WASH. REV. CODE § 9.94A.400(1)(a) (1989).

mine same criminal conduct.<sup>60</sup> The amendment's same time and place requirement parallels *Edwards*. However, the amendment ignores the *Edwards* question of whether one crime furthered another. Furthermore, the amendment mandates that multi-victim offenses are distinct crimes.<sup>61</sup>

In *State v. Dunaway*,<sup>62</sup> the Washington Supreme Court followed the *Edwards* approach to objective criminal intent and the amendment's approach to the same victim requirement. The court examined three separate prosecutions: Dunaway's (first degree kidnapping and first degree robbery); Green's (first degree robbery and attempted first degree murder); and Franklin's (first degree robbery and attempted first degree murder).<sup>63</sup> A unanimous court held that the crimes in each of these cases did not encompass the same criminal conduct. For Dunaway, the kidnapping furthered the robbery, but the crimes affected two victims.<sup>64</sup> For both Green and Franklin, neither of the individual defendant's two crimes furthered the other.<sup>65</sup>

The *Dunaway* court developed a hybrid approach to same criminal conduct based on elements of both *Edwards* and the 1987 amendment. As in *Edwards*, the court focused on whether one crime furthered another.<sup>66</sup> Nevertheless, *Dunaway* explicitly overruled the portion of the *Edwards* holding that crimes affecting two victims can encompass the same criminal conduct.<sup>67</sup> In this respect, *Dunaway* is consistent with the 1987 statutory amendment. However, the *Dunaway* court declined to apply the 1987 amendment because the criminal conduct at issue took place before the effective date of the amendment.<sup>68</sup>

### C. *State v. Collicott*

In *State v. Collicott*,<sup>69</sup> a divided court held that Collicott's first degree rape, first degree burglary, and first degree kidnapping encompassed the same criminal conduct for purposes of determining his offender score.<sup>70</sup> The trial judge held that the three offenses encom-

60. Arguably, the single victim and same time and place requirements may indicate whether objective criminal intent changed from one offense to another.

61. WASH. REV. CODE § 9.94A.400(1)(a).

62. 109 Wash. 2d 207, 743 P.2d 1237 (1987).

63. *Id.* at 210-12, 743 P.2d at 1238-39.

64. *Id.*

65. *Id.* at 217, 743 P.2d at 1242.

66. *Id.* at 215, 743 P.2d at 1241.

67. *Id.*

68. *Id.* at 216, 743 P.2d at 1241.

69. 112 Wash. 2d 399, 771 P.2d 1137 (1989).

70. *Id.*; see *supra* text accompanying note 1 (describing the facts of the case).



passed the same criminal conduct.<sup>71</sup> The Court of Appeals reversed for two reasons.<sup>72</sup> First, each offense was completed before the subsequent ones began.<sup>73</sup> Second, the burglary affected two victims, the counseling center and the rape-kidnapping victim.<sup>74</sup> The Washington Supreme Court reversed, holding that the trial court correctly identified the defendant's offenses as the same criminal conduct.<sup>75</sup>

Although professing to follow *Dunaway*,<sup>76</sup> the *Collicott* court introduced new interpretations of objective criminal intent and the same victim requirement. The court reasoned that accompanying offenses encompass the same criminal conduct if the offenses depend on each other to raise each crime from second to first degree.<sup>77</sup> The Court called this overlapping of offenses "element sharing" and concluded that an element sharing analysis is indispensable to a proper same criminal conduct inquiry.<sup>78</sup> The element sharing analysis enables courts to examine the objective or theoretical intent behind a crime without reference to the defendant's subjective intent.<sup>79</sup>

The *Collicott* opinion targets prosecutors who hope to maximize criminal penalties based on two incompatible theories. The majority forces prosecutors to choose between two different strategies: (1) prosecuting each offense at a lesser degree in order to achieve a higher offender score for each crime (thus, advancing each crime to the right along the horizontal axis of the sentencing grid); and (2) recognizing the interdependence of the offenses in order to charge each offense under a higher degree (thus, moving each crime up the grid's vertical

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71. *Collicott*, 112 Wash. 2d at 402-03, 771 P.2d at 1138. The defense appealed, arguing that the trial judge miscalculated the sentences. The prosecution appealed the holding. *Id.*

Without an offender score, the sentence ranges for *Collicott*'s three crimes are as follows: Rape 1, 51-68 months; Kidnapping 1, 51-68 months; and Burglary 1, 15-20 months. WASH. REV. CODE § 9.94A.310-.320 (1989). If offender scores are calculated for each crime, then the sentence range for each offense increases as follows: Rape 1, 77-102 months; Kidnapping 1, 77-102 months; and Burglary 1, 36-48 months. *Id.* § 9.94A.360(2)-(3); see also 1988 MANUAL, *supra* note 39, III-18, III-56, III-73.

72. *Collicott*, 112 Wash. 2d at 403, 771 P.2d at 1139. The Court of Appeals' decision is found at 50 Wash. App. 1046 (1988) (unreported opinion).

73. *Collicott*, 112 Wash. 2d at 403, 771 P.2d at 1139.

74. *Id.*

75. *Id.* at 404, 771 P.2d at 1139.

76. "Our application of the test in *Dunaway* shows the contours of the correct inquiry." *Id.* at 405, 771 P.2d at 1140; see *supra* notes 62-68 and accompanying text (discussing *Dunaway*). As with *Dunaway*, the 1987 legislative amendment was not binding because *Collicott*'s crimes were committed in September of 1985, before the effective date of the amendment. See *supra* note 54.

77. *Collicott*, 112 Wash. 2d at 406, 771 P.2d at 1140.

78. *Id.*

79. *Id.* at 405, 771 P.2d at 1139.

axis).<sup>80</sup> The prosecutor in *Collicott* relied on the accompanying offenses to elevate each one to the first degree.<sup>81</sup> According to the majority, a prosecutor cannot also contend that the offenses do not encompass the same criminal conduct for purposes of sentencing.<sup>82</sup> Otherwise, “[s]uch a strategy would . . . punish the defendant twice.”<sup>83</sup>

By focusing on the elements of *Collicott*’s crimes, the majority invited a comparison between its interpretation of same criminal conduct and the merger doctrine.<sup>84</sup> The majority argued that the two were distinguishable because crimes merge only when the “same evidence” is used to prove all of the merged crimes.<sup>85</sup> The same criminal conduct exception affords the criminal defendant broader protection because offenses that fall within the exception may not all be subsumed within one greater offense.<sup>86</sup> The majority concluded that because the exception makes no mention of merger, the Legislature intended the exception to function independently of the merger doctrine.<sup>87</sup>

Even with the introduction of a new element sharing analysis, the *Collicott* majority could not justify its holding without reinterpreting the second pillar of the *Dunaway* approach: the same victim requirement. According to the definition of first degree burglary, *Collicott*’s crime affected two victims: the owner of the counseling center and the rape-kidnapping victim.<sup>88</sup> The majority acknowledged as much.<sup>89</sup> The court reasoned, however, that because the prosecutor’s burglary charge focused on the rape and the kidnapping to raise the burglary to

80. *Id.* at 406–07, 771 P.2d at 1140. Forcing the prosecutor to choose between penalties significantly reduces the sentence. For example, the sentencing midpoint for second degree rape is two years. WASH. REV. CODE § 9A.310–.320 (1989). The additional penalty for first degree rape (second degree rape aggravated by an accompanying felony) is three years. *Id.* The additional penalty for second degree rape with an offender score based on the accompanying burglary and kidnapping is two years and six months. *Id.* The majority seems to argue that a defendant may be penalized two years plus the added penalty of three years or two years and six months. A defendant cannot, however, be penalized by two years plus five years and six months. *Collicott*, 112 Wash. 2d at 405, 771 P.2d at 1140.

81. *Collicott*, 112 Wash. 2d at 407–10, 771 P.2d at 1141–42.

82. *Id.* at 406, 771 P.2d at 1140.

83. *Id.*

84. See *supra* notes 21–26 and accompanying text (discussing merger).

85. *Collicott*, 112 Wash. 2d at 410–11, 771 P.2d at 1142.

86. *Id.*

87. *Id.*

88. The owner of the counseling center was the victim of unlawful entry and the theft which *Collicott* intended to commit upon entry. The woman inside the center was also the victim of burglary because *Collicott* assaulted her after illegally entering the building. WASH. REV. CODE § 9A.52.020 (1989).

89. *Collicott*, 112 Wash. 2d at 408–09, 771 P.2d at 1141.

first degree, the woman was the "central victim."<sup>90</sup> Furthermore, in this case only one crime affected the two victims. Therefore, the court concluded, the same victim requirement was satisfied.<sup>91</sup>

Justice Durham, writing for the dissent, severely criticized the majority's reinterpretation of the *Dunaway* test. The dissent argued that in order to ascertain criminal intent, courts must look at the offenses as they occurred and determine if they overlapped in time and place and if they furthered one another.<sup>92</sup> The dissent concluded that none of Collicott's crimes furthered another and therefore the crimes did not encompass the same criminal conduct.<sup>93</sup> In addition, the dissent argued that the majority's focus on the central victim significantly and negatively alters the same victim requirement.<sup>94</sup>

## II. A BETTER APPROACH TO "SAME CRIMINAL CONDUCT"

The *Dunaway* approach to the Sentencing Reform Act's same criminal conduct exception is superior to *Collicott*. The *Dunaway* court used a furtherance test to determine objective criminal intent, whereas the *Collicott* court employed an element sharing analysis. A comparison of these two tests and their application to different fact patterns demonstrates that the two approaches are incompatible. Given this conflict, the *Dunaway* approach is superior because it recognizes that statutory elements alone reveal very little about intent. Furthermore, the *Dunaway* approach facilitates proportionate sentences without subjecting criminal defendants to double punishment. The *Dunaway* approach also promotes proportionate sentences by strictly adhering to the rule that same criminal conduct offenses affect only one victim. Therefore, the Legislature should amend the SRA's definition of same criminal conduct to be consistent with *Dunaway*.

### A. *The Conflict Between Dunaway and Collicott*

Although the *Collicott* majority expressed its fidelity to the *Dunaway* test,<sup>95</sup> the court's element sharing and same victim analyses cannot be reconciled with *Dunaway*. Both cases focused on objective

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90. *Id.* at 409, 771 P.2d at 1141.

91. *Id.*

92. *Id.* at 414, 771 P.2d at 1144 (Durham, J., dissenting).

93. *Id.* at 415-18, 743 P.2d at 1144-46.

94. *Id.* at 418-19, 771 P.2d at 1146.

95. *See supra* note 76.

criminal intent.<sup>96</sup> Each court, however, used a different test to determine whether objective criminal intent changed from one crime to the next. The *Dunaway* court asked whether one crime furthered another.<sup>97</sup> The *Collicott* court instead asked whether the crimes shared elements.<sup>98</sup> The differences between these two approaches are profound and the 1987 amendment does nothing to resolve the disharmony.

Whether or not crimes encompass the same criminal conduct may depend upon how the court defines objective criminal intent. Using an element sharing analysis, the *Collicott* majority determined that a rape, burglary, and kidnapping encompassed the same criminal conduct. The dissent applied a furtherance test and reached the opposite conclusion.<sup>99</sup> Conversely, the *Dunaway* approach will sometimes lead to the conclusion that offenses constitute the same criminal conduct, whereas *Collicott* would compel a different result. The Sentencing Guidelines Commission's lone example of same criminal conduct illustrates this point.<sup>100</sup> Applying the *Dunaway* test, second degree burglary and possession of stolen goods encompass the same criminal conduct because the first crime furthered the second crime. Applying the *Collicott* test, the burglary does not depend on the other offense to raise the level to second degree.<sup>101</sup> Thus, according to *Collicott*, these crimes do not encompass the same criminal conduct. Therefore, the element sharing test not only conflicts with *Dunaway*, but also contradicts the Sentencing Guidelines Commission's sole example of same criminal conduct.

The disparity between *Dunaway* and *Collicott* is also evident in their approaches to multiple victims. According to *Dunaway*, the same criminal conduct exception does not apply if there is more than one victim.<sup>102</sup> The *Collicott* court created a significant exception to this rule, arguing that only central victims should be counted in applying the same victim rule.<sup>103</sup>

The 1987 amendment provides no guidance for choosing between *Dunaway* and *Collicott*. Both courts argued that their respective tests

96. *Collicott*, 112 Wash. 2d at 405, 771 P.2d at 1139-40; *Dunaway*, 109 Wash. 2d at 215, 743 P.2d at 1241.

97. *Dunaway*, 109 Wash. 2d at 215, 743 P.2d at 1241.

98. *Collicott*, 112 Wash. 2d at 406, 771 P.2d at 1140.

99. *Id.* at 415-18, 771 P.2d at 1144-46.

100. See *supra* text accompanying note 51.

101. WASH. REV. CODE § 9A.52.030 (1989).

102. *State v. Dunaway*, 109 Wash. 2d 207, 215, 743 P.2d 1237, 1241 (1987).

103. *Collicott*, 112 Wash. 2d at 408-09, 771 P.2d at 1141.

were consistent with the principles of the amendment.<sup>104</sup> These principles, however, provide only an analytical starting point, which both the *Dunaway* and *Collicott* courts found insufficient to determine whether offenses encompassed the same criminal conduct.<sup>105</sup> Criminal intent is an ambiguous term which the amendment does not define. The *Dunaway* court additionally analyzed whether one crime furthered another.<sup>106</sup> Similarly, the *Collicott* court additionally inquired whether the crimes shared elements and whether the crimes affected only one central victim. Because both cases undertook extra-statutory analysis, the amendment will not likely resolve the conflict between the *Dunaway* and *Collicott* approaches to same criminal conduct.

*B. Furtherance: A Better Approach to Objective Criminal Intent than Element Sharing*

Not only may the *Dunaway* and *Collicott* approaches lead to opposite results based on the same facts, but they are based on fundamentally different theories of objective criminal intent. The *Collicott* approach eschews factual analysis in favor of comparing the statutory elements of the crimes committed. In contrast, the *Dunaway* approach looks at the crimes as they occurred to determine objective criminal intent. Analysis demonstrates that the *Dunaway* furtherance approach is more theoretically compelling than *Collicott*.

The *Collicott* element sharing analysis abandons any inquiry into intent and instead concentrates on statutory elements. The majority argued that analysis of objective criminal intent is not a fact-specific inquiry.<sup>107</sup> Instead, courts should look to the theoretical purpose of the offense as defined by the statute and the prosecutor's charge.<sup>108</sup> In essence, the statute and the prosecutor determine the defendant's objective criminal intent.

The *Dunaway* approach to criminal intent correctly focuses on the individual defendant's acts. Similar to *Collicott*, the *Dunaway* approach ignores the subjective intent of the individual. But according to *Dunaway*, courts should look beyond the statutes and instead examine whether the defendant's intent changed from one crime to the

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104. The *Dunaway* court explicitly endorsed the amendment's three factors. *State v. Dunaway*, 109 Wash. 2d 207, 216, 743 P.2d 1237, 1241 (1987). The *Collicott* court, by reiterating its support of *Dunaway*, implicitly endorsed the amendment's factors. *Collicott*, 112 Wash. 2d at 405, 771 P.2d at 1139-40.

105. *Collicott*, 112 Wash. 2d at 406, 771 P.2d at 1140; *Dunaway*, 109 Wash. 2d at 215, 743 P.2d 1237, 1241.

106. *Dunaway*, 109 Wash. 2d at 215, 743 P.2d at 1241.

107. *Collicott*, 112 Wash. 2d at 405, 771 P.2d at 1140.

108. *Id.*

next by asking whether one offense furthered another.<sup>109</sup> The practical consequences of the theoretical distinction between furtherance and element sharing are profound.

1. *"Element Sharing": The Wrong Analytical Tool for the Job*

In an effort to maximize the protections against cumulative punishment, the *Collicott* majority used a misconceived and unnecessary element sharing approach. Criminal defendants enjoy significant protections against double punishment even without the *Collicott* approach to same criminal conduct. The merger doctrine prevents cumulative punishment for offenses that depend upon each other to raise the level of an offense to first degree.<sup>110</sup> Because element sharing and merger both focus on statutory elements, the *Collicott* majority was compelled to distinguish the two. Nevertheless, element sharing duplicates the protections available under merger. By focusing on objective criminal intent, the *Dunaway* approach provides additional protection where one crime furthers another.

a. *Preventing Cumulative Punishment with the Merger Doctrine*

The common law doctrine of merger protects against cumulative punishment. The *Collicott* majority correctly perceived that merger would not lessen *Collicott*'s sentences. However, merger would protect against double punishment if *Collicott* had not been armed and had committed only the burglary and the rape. Under the merger doctrine,<sup>111</sup> the burglary merges into the rape and is not separately punishable because burglary is a necessary element to prove first degree rape.<sup>112</sup> This serves exactly the same purpose as the *Collicott* element sharing analysis—to prevent the prosecutor from arguing both that current offenses are related in order to enhance the degree of each crime and that current offenses are separate in order to enhance the offender score for each crime.<sup>113</sup>

109. *Dunaway*, 109 Wash. 2d at 215, 743 P.2d at 1241; see also *Collicott*, 112 Wash. 2d at 414, 771 P.2d at 1144 (Durham, J., dissenting).

110. The Double Jeopardy Clause does not afford *Collicott* any protection. Each of *Collicott*'s three offenses requires evidence that the others do not. See *supra* note 2 (describing the elements of first degree burglary, rape, and kidnapping).

111. See *supra* notes 21–26 and accompanying text (discussing the merger doctrine).

112. See *State v. Johnson*, 92 Wash. 2d 671, 600 P.2d 1249 (1979) (*Johnson I*) (holding that the crimes of first degree assault and first degree kidnapping merged into the crime of first degree rape because the merged crimes were necessary elements to prove first degree rape and had no independent purpose or effect).

113. *Collicott*, 112 Wash. 2d at 406–07, 771 P.2d at 1140.

The similarity between element sharing and merger compelled the *Collicott* majority to distinguish the two concepts.<sup>114</sup> The majority argued that crimes may share elements and thus encompass the same criminal conduct, but not merge into one greater offense.<sup>115</sup> The majority asserted that for crimes to merge the same evidence must be used to prove all offenses.<sup>116</sup> However, this standard is the test not for merger but for double jeopardy.<sup>117</sup> This restrictive view of merger cannot be reconciled with the court's decision in *Johnson I*.<sup>118</sup> There, the court held that assault and kidnapping convictions merged into first degree rape even though the merged offenses required proof of elements not shared by the rape.<sup>119</sup> Thus, the *Collicott* majority had to understate the scope of the merger doctrine in order to justify its new element sharing analysis.

The *Collicott* element sharing approach duplicates the protections against double punishment available under merger. Both focus on statutory elements. Justice Durham in dissent recognized the *Collicott* majority's reliance on merger principles as fundamentally different from the *Dunaway* approach: "Merger principles involve comparison of the elements of crimes, without consideration of criminal intent. It is that intent upon which *Dunaway* focuses, a difference that the majority has failed to recognize."<sup>120</sup> By framing its analysis of criminal intent in terms of legal elements, the *Collicott* majority hoped to better protect criminal defendants from double punishment. In fact, the court abandoned the qualitatively different protection available under the *Dunaway* test.

*b. Preventing Double Punishment with the Dunaway Approach*

Courts should keep the same criminal conduct exception distinct from merger because, by focusing on intent, the same criminal conduct exception provides another level of protection against double punishment that is not available under merger. The ostensible purpose of the *Collicott* majority's element sharing analysis is to expand the protections against double punishment beyond what is possible under the current merger doctrine. Nevertheless, the *Collicott* approach, by focusing on the elements of the crime, may actually

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114. *Id.* at 410-11, 771 P.2d at 1142-43.

115. *Id.* at 411, 771 P.2d at 1142.

116. *Id.*

117. See *supra* text accompanying notes 13-20 (discussing double jeopardy).

118. *State v. Johnson*, 92 Wash. 2d 671, 600 P.2d 1249 (1979) (*Johnson I*).

119. *Id.* at 680-81, 600 P.2d at 1254.

120. *Collicott*, 112 Wash. 2d at 414 n.2, 771 P.2d at 1144 n.1 (Durham, J., dissenting).

afford the criminal defendant less protection in some cases than *Dunaway* coupled with the merger doctrine. This is evident by applying both tests to the facts of a pre-SRA merger case. In *State v. Johnson (Johnson II)*,<sup>121</sup> the defendant was convicted of first degree statutory rape and indecent liberties for two incidents that occurred at the same time and place and involved the same five-year-old girl.<sup>122</sup> The Washington Supreme Court held that the two convictions did not merge because committing indecent liberties was not an element of first degree statutory rape.<sup>123</sup>

The *Collicott* approach would not help the defendant in *Johnson II*. Applying the element sharing analysis to these facts mandates the conclusion that statutory rape and indecent liberties do not encompass the same criminal conduct. The elements of first degree statutory rape do not include indecent liberties.<sup>124</sup> Therefore, since a statutory rape conviction does not depend on the indecent liberties conviction to obtain a higher degree, the two offenses do not fall within the same criminal conduct exception.<sup>125</sup>

The *Dunaway* test would yield a vastly different result. The *Dunaway* approach focuses on the defendant's objective criminal intent and whether one crime furthered another. In *Johnson II*, the two crimes of statutory rape and indecent liberties furthered a single criminal purpose—to have sexual contact with a child.<sup>126</sup> Thus, these crimes encompass the same criminal conduct and therefore the defendant's sentences may not be enhanced by an offender score.

Together the merger doctrine and the *Dunaway* approach provide two levels of protection against double punishment. Under merger, when one offense raises the degree of another offense, the lesser offense merges into the greater offense. The *Dunaway* approach provides a second level of protection. If the defendant's criminal purpose did not change from one offense to another, then the offenses encompass the same criminal conduct and the sentences cannot be enhanced by an

121. 96 Wash. 2d 926, 639 P.2d 1332 (1982).

122. *Id.* at 927, 639 P.2d at 1333. A person over thirteen years old is guilty of statutory rape for engaging in sexual intercourse with a person who is less than eleven. WASH. REV. CODE § 9A.44.070 (1989). Indecent liberties occurs when a person knowingly makes sexual contact with another person who is less than fourteen years of age. *Id.* § 9A.44.100.

123. *Johnson II*, 96 Wash. 2d at 934, 639 P.2d at 1336.

124. See *supra* note 122 (describing the elements of both crimes).

125. Sexual contact is arguably an element of both statutory rape and indecent liberties. However, the *Collicott* majority gave no indication that element sharing meant anything other than crimes depending on each other to raise the degree of each crime. *State v. Collicott*, 112 Wash. 2d 399, 406, 771 P.2d 1137, 1140 (1989).

126. D. BOERNER, *supra* note 28, § 5.8(a), at 5-18.



offender score. The *Collicott* court understates the protection against double punishment available under merger and construes the same criminal conduct exception such that it does not provide the second level of protection available under *Dunaway*.

## 2. *The Dunaway Approach Ensures Proportionate Sentences*

In addition to preventing double punishment in conjunction with the merger doctrine, the *Dunaway* approach to objective criminal intent facilitates results consistent with the goals of the SRA. One of the primary purposes of the SRA is to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history."<sup>127</sup> The furtherance test better fulfills this primary goal of the SRA than the *Collicott* element sharing test.

The *Collicott* majority implicitly argued that the element sharing analysis guarantees proportionate sentences. According to the majority, accompanying offenses may be used to either raise the level of each crime to the first degree or to enhance the offender score of each crime under a lesser degree.<sup>128</sup> Using the same accompanying offenses to enhance the offender score and degree of each crime, the court argued, punishes the defendant twice.<sup>129</sup> In other words, without element sharing, criminal defendants would be subject to disproportionate sentences.

Despite the majority's assertions, element sharing undermines proportionate sentencing. The *Collicott* approach fails to punish the defendant for any offense after the first two. In *Collicott*, even without the deadly weapon,<sup>130</sup> only one other current offense is needed to raise the level for each offense from second to first degree.<sup>131</sup> For example, the rape could be raised to the level of first degree either by the accompanying burglary or kidnapping.<sup>132</sup> Thus, given that the defendant's sentences will be served concurrently, the majority's scheme fails to punish the defendant for the accompanying offense that did not raise the rape to first degree. *Collicott*'s three offenses are more serious than any one or any two of these crimes. Based on the majority's decision,

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127. WASH. REV. CODE § 9.94A.010(1) (1989).

128. *Collicott*, 112 Wash. 2d at 406-07, 771 P.2d at 1140.

129. *Id.* at 406, 771 P.2d at 1140.

130. The court acknowledged that the deadly weapon alone would raise the burglary and rape to first degree, but argued that the prosecutor's charge primarily relied on the accompanying offenses to raise the degree of each. *Collicott*, 112 Wash. 2d at 408, 771 P.2d at 1141.

131. WASH. REV. CODE §§ 9A.40.020, 9A.44.040, 9A.52.020 (1989).

132. *Id.*; see *supra* note 2 (describing the elements of first degree rape).

however, he receives the same sentence range as if he had only raped or kidnapped.

Under the *Collicott* approach, violent offenses may go unpunished. Consider an offender, armed with a deadly weapon, who illegally enters a house intending to steal any valuables. While inside, the offender encounters the owner of the house, beats her into unconsciousness, and then rapes her. The victim dies from the wounds inflicted before the rape.

In this scenario, the defendant could be charged with first degree burglary,<sup>133</sup> first degree rape,<sup>134</sup> and first degree felony-murder.<sup>135</sup> Once apprehended, the defendant pleads guilty to each of the three first degree offenses. If the prosecutor's charge for each crime relies in part on the other two offenses, then the trial court would be obliged to follow *Collicott* and find that all of the offenses encompass the same criminal conduct. In this hypothetical, the defendant's sentence range is 240–320 months—the same sentence range earned by a defendant who pleads guilty to first degree murder with no accompanying offenses.<sup>136</sup> Because judges retain discretion within the sentencing range, it is even possible that the second defendant may receive a sentence at the high end of the range and that the first defendant may receive a sentence at the lower end. Thus, the *Collicott* element sharing analysis makes disproportionate sentences possible.

Such a disproportionate sentence is not possible under the *Dunaway* test, which focuses on whether one crime furthered another.<sup>137</sup> In the hypothetical discussed above, the crimes took place at the same time and place and did not involve multiple victims, but none of the crimes furthered one another. The burglary did not further the rape because the burglary was completed as soon as the defendant illegally entered the house with an intent to steal.<sup>138</sup> The rape did not further the murder because the victim died from the earlier blows. Therefore, under the *Dunaway* test, the three first degree offenses in the hypothetical did not encompass the same criminal conduct. Thus the sentence range for each offense must be enhanced by an offender score. As a result,

133. WASH. REV. CODE § 9A.52.020 (1989); see *supra* note 2 (defining the elements of burglary).

134. WASH. REV. CODE § 9.44.040; see *supra* note 2 (defining the elements of rape).

135. WASH. REV. CODE § 9A.32.030(1)(c).

136. *Id.* § 9.94A.310–.320 (1989). The felony-murder determines the sentence range because it has the highest seriousness level (XIII).

137. *State v. Dunaway*, 109 Wash. 2d 207, 215, 743 P.2d 1237, 1241 (1987).

138. WASH. REV. CODE § 9A.52.020.

the defendant's sentence range would be 291–388 months.<sup>139</sup> This sentence is more proportionate than the 240–320 months mandated by *Collicott* because it punishes the third crime. Consequently, the *Dunaway* test more faithfully adheres to the SRA's purpose that sentences should be proportionate to the seriousness of the crimes committed.

### C. *The Central Victim Exception Swallows the Same Victim Rule*

In addition to facilitating disproportionate sentences with its element sharing analysis, the *Collicott* majority emasculated the rule that same criminal conduct offenses cannot affect multiple victims. The majority argued that although *Collicott*'s burglary victimized the owner of the counseling center, the rape-kidnapping victim was the central victim of the burglary.<sup>140</sup> A crime may involve a purely nominal victim.<sup>141</sup> Nevertheless, *Collicott* illegally entered the counseling center and stole electronic equipment once inside.<sup>142</sup> This conduct alone satisfies the elements of first degree burglary—hardly a nominal crime.<sup>143</sup> The majority's reasoning leads to the conclusion that whenever a crime affects two victims, courts should consider only the victim who was most affected by the crime. Thus, the majority's central victim analysis cripples the same victim requirement. Here again the *Dunaway* approach is more proportionate than *Collicott*.

### D. *Restoring the Dunaway Approach*

The conflict between the *Dunaway* and *Collicott* approaches to same criminal conduct necessitates legislative resolution. Both cases agree that objective criminal intent is the key to same criminal conduct. The *Dunaway* court used a furtherance test to determine intent, whereas *Collicott* employed an element sharing test. These two tests, however, are irreconcilable and can lead to opposite results.<sup>144</sup> The furtherance test is theoretically more sound than an element sharing analysis, provides adequate protection against double punishment when coupled

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139. *Id.* § 9.94A.310. This sentence range is based on the felony-murder's seriousness level (XIII). *Id.* § 9.94A.320. In addition, the sentence is enhanced by an offender score of five (three for first degree rape and two for first degree burglary). *Id.* § 9.94A.330.

140. *State v. Collicott*, 112 Wash. 2d 399, 408–09, 771 P.2d 1137, 1141 (1989); see *supra* note 88 (explaining how the woman was victimized by the burglary).

141. Justice Durham, in dissent, acknowledged that tangential victims should not be considered in applying the same victim requirement. *Collicott*, 112 Wash. 2d at 419, 771 P.2d at 1146 (Durham, J., dissenting).

142. *Id.* at 401, 771 P.2d at 1137.

143. WASH. REV. CODE § 9A.52.020 (1989).

144. See *supra* text accompanying notes 95–106.

with the merger doctrine, and facilitates proportionate sentences.<sup>145</sup> Therefore, the Legislature should codify the *Dunaway* approach. The furtherance test could be incorporated by defining same criminal conduct as “two or more crimes, *each of which furthers another*, that require the same criminal intent, are committed at the same time and place, and involve the same victim.”<sup>146</sup> The proposed amendment obliges courts to face squarely the *Dunaway* question of whether one crime furthered another.

In order to ensure that courts give effect to the Legislature’s intent, the Legislature should clarify two issues in a legislative report. First, the report should clearly state that intent, and not statutory elements, is the proper focus of the same criminal conduct inquiry. Courts must use the furtherance test to determine whether objective criminal intent changed from one crime to the next. Second, the report should specifically state that the same victim requirement is violated whenever a crime significantly affects more than one person. Thus, the Legislature can overrule *Collicott* and restore *Dunaway* as the correct approach to same criminal conduct.

### III. CONCLUSION

The Washington Supreme Court, in an effort to protect criminal defendants from double punishment, has redirected the focus of the SRA’s “same criminal conduct” exception from the objective criminal intent of the defendant to the elements of the crimes committed. Although the *Collicott* “element sharing” approach helped the defendant in that case, adequate protection based on statutory elements is currently available under the merger doctrine. More importantly, element sharing is defective because it makes possible disproportionate sentences. In *Collicott* the defendant who raped, kidnapped, and burglarized received a sentence range no greater than had he only raped or only kidnapped. Thus, once a defendant commits a felony there may be no additional punishment for any additional crimes.

*State v. Dunaway* provides a superior approach to the same criminal conduct exception. By focusing on intent, *Dunaway* offers a second level of protection against double punishment, which is not available under *Collicott* or the merger doctrine. Crimes may not share elements and yet further each other. Furthermore, the disproportionate result in *Collicott* is not possible under the *Dunaway* approach, which requires that same criminal conduct offenses further each other. *Dun-*

145. See *supra* text accompanying notes 107–39.

146. Emphasis for purposes of this Note only.

*away* additionally guarantees more proportionate sentences by mandating that same criminal conduct offenses affect only one victim.

The Legislature should restore the *Dunaway* approach by amending the definition of same criminal conduct to include the furtherance test. The Legislature should also create legislative history explicitly endorsing the *Dunaway* interpretations of objective criminal intent and the same victim requirement. Such legislative action would clarify an unsettled area of Washington sentencing law and ensure that punishments are proportionate to the seriousness of the crimes committed.

*Joseph P. Bennett*

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